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Supreme Court of the United States

October Term, 1975
No. 75-1219

JAMES F. SEXTON,
Petitioner,

vs.

WILLIAM E. SIMON, *Secretary of the Treasury, et al.,*
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITIONER'S REPLY BRIEF

James F. Sexton
1021 Fidelity Building
Cleveland, Ohio 44114
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Respondent admits (Opposing Memo, p. 5) conflict between circuits concerning the "substantial evidence" rule. Although respondent refers (Opposing Memo, pp. 5-6) only to *Charlton v. United States*, 412 F.2d 390 (3rd Cir.) and *Pauley v. United States*, 419 F.2d 1061 (7th Cir.), the ultimate result (Pet. 12-15) is that the Sixth and Seventh Cir-

cuits do not apply the "substantial evidence" rule recognized and followed in the District of Columbia, Fourth and Fifth Circuits. This conflict between circuits, now conceded, alone is sufficient cause for a grant of certiorari.

As applied to an employee discharge, respondent misconstrues and misstates the application of the "substantial evidence" rule in *Camp v. Pitts*, 411 U.S. 138 (1972). That case holds in a National Bank case that the District Court is not to hold a "de novo" hearing in which to apply the test. By dicta, this Supreme Court also states that the "substantial evidence" test is to apply in an employee discharge case, when at page 141 it states:

> "* * * Accordingly, the proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record, 5 U. S. C. § 706(2)(E). * * *"

This in substance was the holding in *Charlton v. United States, supra*, in its application of the substantial evidence test. The interpretation of this Supreme Court's prior decisions now becomes added reason for grant of certiorari.

Respondent also endeavors to avoid certiorari by contending that the facts in the case justify the result. Respondent's contention (Opposing Memo, p. 6) that petitioner makes no claim contrary to its statement of fact is misleading and just is not true. Petitioner claims (Pet., p. 8) that the evidence in the administrative record supports his factual statement. Respondent's contentions are to the contrary. However, whatever the contentions, the respondent's Memorandum makes it quite clear that the transfer was "adverse action" within the rationale of *Motto v. General Services Administration*, 335 F. Supp. 694

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(E.D. La., 1971), *affirmed* 502 F.2d 1165 (5th Cir., 1974), *cert. denied* 420 U.S. 927, and thereby establishes conflict on the transfer aspect of the case (Pet., pp. 9-11). Whether the "pretext" was both to circumvent the Veterans Preference Act and infringe upon protected First Amendment rights, of course, can be determined only by a "substantial evidence" review of the administrative record. Respondent concedes (Opposing Memo, p. 6) that this was not done. Under such circumstances, the conflict between circuits as to the "pretext" and the "adverse action" of the transfer becomes additional reason for grant of certiorari, particularly in a case decided on a motion for summary judgment wherein the facts are not supposed to be subject to dispute.

Petitioner respectfully submits that respondent's Memorandum in Opposition presents no valid objection to a grant of certiorari. Petitioner therefore again submits that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JAMES F. SEXTON
Counsel for Petitioner